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No. 84-228

IN THE

# Supreme Court of the United States

OCTOBER TERM 1984

SHAHEEN NATURAL RESOURCES COMPANY, INC.,

*Petitioner,*

– against –

LA SOCIETE NATIONALE POUR LA RECHERCHE, LA PRODUCTION, LE TRANSPORT, LA TRANSFORMATION ET LA COMMERCIALISATION DES HYDROCARBURES,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALFRED FERRER III
SHEARMAN & STERLING
*Attorneys for Respondent*
53 Wall Street
New York, New York 10005
(212) 483-1000

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## QUESTIONS PRESENTED

1. Did the United States District Court for the Southern District of New York (Duffy, J., presiding) and the United States Court of Appeals for the Second Circuit (Feinberg, C.J., Winter and Lasker, JJ., presiding) in a unanimous decision err in confirming pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards a foreign arbitral award rendered in Switzerland in favor of Respondent by a unanimous three-member panel of the International Chamber of Commerce for Petitioner's breaches of a written contract, which the Petition discloses were admitted by Petitioner?

2. Did the lower Courts err in construing the unambiguous language of the Convention in a manner supported by both the major purpose of the Convention

and all judicial decisions that have addressed that issue?

3. Did the lower Courts err in finding that Petitioner, having suffered no deprivation of any rights by the Convention, having voluntarily agreed to the arbitral clause that invoked the Convention and having reaped the benefits of the contract containing that clause, failed to raise a Constitutional basis for invalidating the primary worldwide framework for the consensual resolution of international commercial disputes, upon which thousands of commercial parties in this country and throughout the world have relied for the past 25 years?

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Respondent La Societe Nationale pour la Recherche, la Production, le Transport, la Transformation et la

Commercialisation des Hydrocarbures[1] ("Sonatrach")[2] submits this brief in opposition to the Petition for a Writ of Certiorari by Shaheen Natural Resources Company, Inc. ("Shaheen").

## STATEMENT OF CASE

Ten years ago, Shaheen, an Illinois corporation with its primary office in New York City, lifted two ship-loads of crude oil from Algerian ports pursuant to a written contract with Sonatrach, Algeria's national oil and gas company. Shaheen failed to pay the contractual price and breached the contract in a number of other ways.

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1 Translation: "The National Company for the Exploration, Production, Transportation, Processing and Marketing of Hydrocarbons".

2 The listing of parents, subsidiaries, and affiliates pursuant to Sup. Ct. R. 28.1 is annexed as Appendix A.

Pursuant to the arbitration clause in the contract, Sonatrach commenced an International Chamber of Commerce ("ICC") arbitration in Switzerland. The arbitral proceeding lasted three years and eight months, primarily due to Shaheen's delaying tactics. At no time during the arbitral proceedings did Shaheen raise the arguments it advances in its Petition for Certiorari.

In November 1981, the three-member international arbitral panel, composed of Swiss, American and Algerian representatives, unanimously rendered an award in favor of Sonatrach for Shaheen's breaches of the contract.

Sonatrach then commenced in the District Court below an action to confirm the award pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(the "Convention"), [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, implemented by 9 U.S.C.A. §§ 201-08 (West Supp. 1984). Shaheen moved to dismiss or stay the action, purporting to assert grounds pursuant to 9 U.S.C.A. § 207, which lists those limited defenses available in a confirmation proceeding pursuant to the Convention.

In a 21-page Memorandum & Order, dated November 15, 1983, the District Court denied Shaheen's motion and granted confirmation of the award. 585 F. Supp. 57. Judgment was subsequently awarded to Sonatrach in the amount of $4,751,029, together with interest and costs.

On Shaheen's appeal to the United States Court of Appeals for the Second Circuit, that Court unanimously affirmed the judgment for the reasons set

forth in the District Court's Memorandum & Order. 733 F.2d 160 (1984).

In rejecting Shaheen's challenge to confirmation, the opinion below recognized the Court's limited power under the Convention to review a foreign arbitral award. 585 F. Supp. 57, 61. The opinion acknowledged that the "burden of proving that an award should be overturned is on the party challenging the enforcement and recognition of the award", and that the grounds for refusing to enforce an award are limited to those "narrowly prescribed situations" specified in the Convention. Id. at 61.

After finding that Sonatrach had satisfied its affirmative showing under the Convention by submitting an "authenticated original award or a duly certified copy thereof" and the "agreement to arbitrate", id. at 61, the opinion below

addressed and rejected the arguments raised by Shaheen.

Rejected as "frivolous", id. at 64, "circular", id., "wholly without merit", id., "waived", id. at 62, 64-65, "overruled", id. at 63, and "grasping for straws", id. at 65, were the arguments below that Shaheen has not raised in its Petition for Certiorari.

As to the points Shaheen advances in its Petition, the opinion below rejected Shaheen's argument that enforcement of the award should be denied because Algeria is not a signatory to the Convention. As in its Petition, Shaheen below tried to cloak that argument in Constitutional dress. The District Court found the argument to be "wholly without merit" and, additionally, not a proper defense under the Convention.

Moreover, the opinion found that Algerian courts would in fact enforce an ICC award rendered in a signatory country regardless of the nationality of the parties. Id at 64. Finally, the opinion below emphasized that Shaheen voluntarily signed the contract containing the arbitral clause and could not later seek to avoid the consequences of its acquiescence to the arbitral provisions in the contract. Id at 64.

## REASONS FOR DENYING THE WRIT

This Petition for a Writ of Certiorari presents no "special and important reasons" that should lead this Court to exercise its discretion and undertake a review of the unanimous decision of the Second Circuit. See Sup. Ct. R. 19.

The Courts below confirmed a unanimous arbitral award for the most basic of claims--the purchase price due for goods sold pursuant to a written contract. Shaheen even discloses in its Petition that it had "admitted liability" on Sonatrach's claim, Pet. at 5, and even characterizes Sonatrach's claim as "undisputed", Pet. at 7. Thus, there could be no interest beyond the parties for this clear-cut contractual claim.

The arbitration was conducted in the manner the parties agreed upon in the contract, and the applicability of the Convention to confirmation of the award is clear--consistent with the "unambiguous" language of the Convention, with its major purpose and with every judicial decision that has addressed that issue.

Moreover, in light of the strong public policy favoring international arbitration expressed by this country's adherence to the Convention, as recognized by this Court in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), there are strong reasons why this Court should not grant the Petition. To do so would call into doubt the primary world-wide framework for the consensual resolution of international commercial disputes and cause legal uncertainty for the thousands of commercial parties in this country and throughout the world that have relied on this framework for the past 25 years and have outstanding contracts with arbitration clauses drafted so that the Convention would apply. Such a drastic blow to international commerce should not be considered,

particularly when Shaheen has admitted Sonatrach's underlying contract claims.

Finally, the arguments advanced by Shaheen are without any plausible merit and were properly rejected by both the unanimous Second Circuit panel and the District Court.

## A. THIS COURT HAS RECOGNIZED THE STRONG PUBLIC POLICY IN FAVOR OF ENFORCEMENT OF THE CONVENTION

The Convention, which was adopted in 1958 by 26 countries at the conclusion of the United Nations Conference on Commercial Arbitration held in New York, was acceded to and implemented by the United States in 1970. It provides for the recognition and enforcement of arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ...." 9 U.S.C.A. § 201

(West Supp. 1984); Scherk, supra, at 520 n.15; Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974).

As recognized by this Court, "[t]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." Scherk, supra, at 520 n.15.

A contractual dispute-resolution clause was, in this Court's view, "an almost indispensable precondition to achievement of the orderliness and pre-

dictability essential to any international business transaction." Id. at 516. "A parochial refusal by the courts of one country to enforce an international arbitration agreement" would, as this Court admonished, lead to a "legal no-man's-land [that] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." Id. at 516-17.

To encourage international arbitration, the Convention and its implementing legislation in the United States liberalized the procedures for enforcing foreign arbitral awards. As the Second Circuit explained:

> While the [1927] Geneva Convention placed the burden of proof on the party seeking enforcement of a foreign arbitral award and did not circum-

> scribe the range of available defenses to those enumerated in the convention, the 1958 Convention clearly shifted the burden of proof to the party defending against enforcement and limited his defenses to seven set forth in Article V.

Parsons, supra, at 973.[3]

In addition, the United States' implementing legislation incorporated the expedited procedures already provided by the United States Arbitration Act. Thus, application under the Convention for confirmation of a foreign arbitral award is made by motion procedures. 9 U.S.C.A. §§ 6, 207-08 (West 1970 and Supp. 1984).

Finally, the Convention and its implementing legislation provide that the only evidence required for confirmation of a foreign arbitral

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3 Emphasis is added throughout this brief unless otherwise noted.

award is the arbitration agreement and the award.[4] 9 U.S.C.A. § 201 (West Supp. 1984). Sonatrach submitted certified copies of both the arbitration agreement, which is Article 19 of the Contract, and the Award. Consequently, Sonatrach satisfied its initial burden in obtaining confirmation under the Convention.

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4 The only conceivable additional requirements arise out of two reservations the United States declared in acceding to the Convention. As permitted by Article I, Section 3 of the Convention, the United States declared that it will apply the Convention (1) only to those awards "made in the territory of another Contracting State", i.e., a signatory to the Convention, and (2) only to differences arising out of "commercial" relationships. 9 U.S.C.A. § 201 (West Supp. 1984). Switzerland, where the Award was made, is a signatory to the Convention. See id. Similarly, the Award resulted from Shaheen's breach of an agreement to purchase crude oil from Sonatrach, an obviously "commercial" relationship. Thus, Sonatrach's application complies with the United States' declarations.

As the Second Circuit has recognized, the Convention "clearly shifted the burden of proof to the party defending against enforcement [of a foreign arbitral award] and limited his defenses to seven set forth in Article V." Parsons, supra, at 973. Moreover, those seven limited defenses have been narrowly interpreted by the courts to further the "pro-enforcement" policy of the Convention. Id.

As recognized by the Courts below, the arguments raised by Shaheen are devoid of any plausible factual or legal support.

B. THE COURTS BELOW CORRECTLY REJECTED SHAHEEN'S ARGUMENTS THAT CONFIRMATION SHOULD BE DENIED BECAUSE ALGERIA IS NOT A SIGNATORY TO THE CONVENTION

Shaheen's Petition argues that it would be both illogical and unconstitutional to permit Sonatrach to invoke

the Convention since Algeria is not a signatory to it. The Courts below properly rejected that contention since the clear purpose of the Convention was to provide for enforcement based on the situs of the arbitration rather than the nationality of the parties and since Shaheen raised no constitutional issue.

### 1. The Convention Does Not Limit Enforcement to Parties from Signatory Countries

Shaheen argues that Sonatrach should not be permitted to invoke the Convention because Algeria is not a signatory to it. As recognized by the opinion below, the Convention includes no such requirement. 585 F. Supp. 61, 64. Rather, the only applicable territorial requirements concern the

location of the arbitration--not the nationality of the parties.

Article I, Section 1 of the Convention provides that the Convention "shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ...." (text of Convention follows 9 U.S.C.A. § 201 (West Supp. 1984)). That provision focuses on the location of the arbitral proceedings, not the nationality of the enforcing party.

Article I, Section 3 of the Convention permits a country acceding to the Convention to "on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."

Id. The United States has adopted that reservation. Id. Like Article I, Section 1, the United States' reservation concerns only the situs of the arbitration, not the nationality of the party seeking to enforce the award.

Sonatrach's Award was made in Switzerland, which is both a "Contracting State" and "a State other than the State where the recognition and enforcement of such awar[d] [is] sought", i.e., the United States. Thus, the territorial requirements for enforcement of the Award are met.

Neither the Convention nor the United States' implementing legislation includes a requirement relating to the nationality of a party to the arbitration. Specifically, there is no requirement that the party seeking to enforce an award be a national of a contracting

State. 9 U.S.C.A. § 201-08 (West Supp. 1984); McClendon, Enforcement of Foreign Arbitral Awards in the United States, 4 Nw. J. Int'l L. and Bus. 58 (1982); Comment, International Commercial Arbitration Under the United Nations Convention and the Amended Federal Arbitration Statute, 47 Wash. L. Rev. 441 (1972); Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. (1961); Pisar, The United Nations Convention on Foreign Arbitral Awards, 33 S. Cal. L. Rev. 14 (1959).

Enforcement by a national of a non-contracting State was an intentional departure by the Convention from the prior international enforcement framework. The 1927 Convention on the Execution of Foreign Arbitral Awards

(the "Geneva Convention") had incorporated the provisions of the 1923 Protocol on Arbitration Clauses (the "Geneva Protocol"), which extended enforcement to only awards made both (1) in a contracting State and (2) between nationals of contracting States. 3 Hudson, International Legislation 2153-60 (1932); 2 Hudson, International Legislation 1062-65.

After 30 years of experience with the Geneva Protocol and the Geneva Convention, the limitation of enforcement to only nationals of contracting States came to be criticized as one of the reasons why those treaties "[had] not produced the widespread international enforcement of arbitration agreements and awards which was expected of them." Quigley, supra, at 1055; see also Pisar, supra.

In addition to the Convention's break from the prior international framework, the United States' accession to the Convention was a departure from this country's earlier approach to the enforcement of foreign arbitral awards. Previously, enforcement had been addressed only in bilateral treaties of friendship, commerce and navigation, which covered only nationals of the two treaty parties. Comment, supra. Accession to the Convention, however, involved a new approach:

> As a result of the reservations made by the United States, the Convention extends only to arbitration taking place in a country adhering to the Convention, regardless of the nationality of the parties. In contrast, the bilateral treaties of friendship, commerce and navigation discussed above extend their protection to nationals of the signatory powers, regardless of the place of arbitration.

Id. at 447.

Thus, rejection of reciprocity based on the nationality of a party is an important feature of the Convention and the United States' accession to it. Shaheen's attempt to resuscitate such "party" reciprocity is without support and was properly rejected by the Courts below.

Shaheen argues that Article XIV[5] injects ambiguity into the Convention. Pet. at 34-40. Shaheen then reasons that logic must supply a prohibition that the language of the Convention and its history do not. Pet. at 34-40.

Article XIV injects no ambiguity into the Convention, and its "logic" supports what Article I,

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5 "A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention." 9 U.S.C.A. § 201 (West Supp. 1984).

Sections 1 and 2, and the Convention's history make clear: the Convention applies to nationals of both contracting and non-contracting States, as long as the award is made in a contracting State.

The purpose of Article XIV is to make reciprocal any limitation of enforcement due to a State's adoption of the reservations permitted by Article I, Section 3 of the Convention (i.e., limiting enforcement only to awards (1) made in the territory of another contracting State, and/or (2) arising out of "commercial" relationships). See, e.g., Pisar, supra. Since only contracting States can adopt such reservations, Article XIV obviously does not apply to non-contracting States, like Algeria. The clear language of Article XIV confirms that interpretation. It addresses only contracting States.

That Article XIV speaks only to the situs of the arbitration rather than the nationality of the parties has been amply illustrated:

> [E]ven in the presence of such reciprocity declarations [of Article I, Section 3] on the part of adhering states, the measure of reciprocity afforded under the Geneva Convention of 1927 is no longer available. This may be illustrated as follows: An American and a Greek company agree to arbitrate in Sweden. If the United States and Sweden are parties to the Convention and Greece is not, the Greek company, if successful, could invoke the Convention to obtain enforcement of its award in United States courts, whereas the American company, if successful, would not necessarily qualify for such relief in Greek courts. A reservation to the Convention by the United States would not affect this result, since the reciprocity requirement would only operate in relation to Sweden. In the light of prior experience, the elimination of the principle of personal reciprocity has considerable justification, for the alternative would have been to re-

> introduce into the Convention the crippling requirement that each of the parties to an award must be subject to the jurisdiction of an adhering state.

Pisar, supra, at 19-20.

Shaheen's argument that it is absurd to base enforcement on a situs that may have no interest in the outcome of the dispute ignores the importance of "neutral forums" in international transactions; the very value of such a forum is often due to its lack of relationship with any of the parties.

As the opinion below acknowledged, courts have consistently enforced awards obtained by nationals of non-contracting States where the arbitration took place in a contracting State. 585 F. Supp. 61, 64.

In Jugometal v. Samincorp, Inc., 78 F.R.D. 504 (S.D.N.Y. 1978), the

plaintiff, a Yugoslavian corporation, sought confirmation of an arbitral award rendered in France. Yugoslavia is not a signatory to the Convention. The Court, in confirming the award, stated:

> Jugometal is a corporate entity or state trading company organized under the laws of Yugoslavia. That nation is not a party to the Convention, nor is it a party to any other international convention or treaty for the enforcement of arbitral awards to which the United States is also a party. France, however, the place where all these arbitrations took place, is a party to the Convention.

Id. at 505. The Court consequently found the Convention applicable.

Similarly, in Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d 334 (5th Cir. 1976), the Fifth Circuit affirmed confirmation of an arbitral award obtained by the Ethiopian Govern-

ment. Ethiopia is not a signatory to the Convention.

In Andros Compania Maritima, S.A. v. Andre & CIE, S.A., 430 F. Supp. 88 (S.D.N.Y. 1977), which involved a claim by a corporation from Panama, a non-signatory to the Convention, against a Swiss corporation, the Court found the Convention applicable because the parties had agreed to arbitration in England, a signatory to the Convention:

> Garnac maintains that the above arbitration clause places the dispute between Andros and Andre within the bounds of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [the Convention], 3 U.S.T. 2517, T.I.A.S. No. 6997, as implemented by Sections 201-08 of the Federal Arbitration Act, 9 U.S.C. §§ 201-08 (1976 Supp.). In the light of 9 U.S.C. § 202, and of the United Kingdom's accession to the Convention in September 1975, U.K. Treaty Command No.

> 6419, Andros would hardly be able to counter that contention.

Id. at 90

2. Shaheen Raises No Constitutional Issue

Carrying its reciprocity argument one step further, Shaheen argues that it would be a violation of the "due process" and "equal protection" provisions of the United States Constitution to permit Sonatrach to invoke the Convention. Shaheen raises no real constitutional issue.

First, as the District Court emphasized rejecting Shaheen's argument as "wholly without merit", Shaheen voluntarily entered into the arbitration clause that invoked the Convention. 585 F. Supp. 61, 64. Rather than deprive Shaheen of any rights or property, the

Convention merely accorded Shaheen the option of a consensual international dispute-resolving mechanism that could be used only if Shaheen affirmatively accepted it. Having done so, Shaheen "cannot now seek to avoid the consequences of its acquiescence to the arbitration provision in the contract." Id.

Moreover, even assuming, arguendo, a Constitutional or other right to reciprocal enforcement rights in Algeria, the District Court found that, even though Algeria has not adhered to the Convention, Algerian courts would in fact enforce an ICC arbitral award rendered in a signatory country regardless of the nationality of the parties. Id.

Finally, the District Court recognized that Shaheen's reciprocity argument, even if it had any factual

support, is not a ground stated in the Convention upon which enforcement can be denied, and since Shaheen had the opportunity to raise that argument in the arbitration, the failure to do so waives it. Id.

What Shaheen really objects to is the Convention itself and the United States' accession to it. Whether the pre-Convention framework of enforcing foreign awards should have been continued is not for courts to decide. Rather, this country's accession to the Convention was based on the inadequacy of the prior framework and the importance of encouraging international commercial arbitration. That accession had been in place four years when Shaheen signed the contract providing for arbitration in Switzerland, a signatory to the Convention since 1965. See 9 U.S.C.A.

§ 201 (West Supp. 1984). Thus, the rules were known. Shaheen's argument that the enforcement mechanism it agreed to in the contract should now be disregarded is disingenuous.

Moreover, principles of waiver, estoppel and laches should reject that argument from someone who voluntarily entered into a contract with such a clause, who then reaped the benefits of the contract by accepting the other party's product without paying for it, and who then delayed raising that argument for nine years.

The applicable, if much simpler, reciprocity issue in this case is that since Shaheen took the goods, Sonatrach was entitled to payment. The District Court properly confirmed the award, and the unanimous decision of the Second Circuit properly affirmed that result.

## CONCLUSION

For the reasons set forth above, Sonatrach respectfully requests this Court to deny the Petition for a Writ of Certiorari.

Dated: New York, New York
September 7, 1984

Respectfully submitted,

ALFRED FERRER III
Shearman & Sterling
Attorneys for Respondent
53 Wall Street
New York, New York 10005
(212) 483-1000

# APPENDIX

## Appendix A

## Rule 28.1 Listing of Parents, Subsidiaries, and Affiliates of Respondent

Respondent Sonatrach is wholly-owned by the Democratic and Popular Republic of Algeria and is operated under the supervision of the Ministry of Energy and Petrochemical Industry. Sonatrach has no United States subsidiaries not wholly-owned and no United States affiliates. This listing does not include any Sonatrach subsidiaries and affiliates outside the United States.